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"Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings"
Raymond H. Brescia, Yale University - Law School, Albany Law School

Courts across the country are being saddled with a rapid escalation of foreclosure filings due to the fallout from the subprime mortgage crisis. More than two million homeowners stand to lose their home in the United States in the next year, and hundreds of billions of dollars in home equity will be lost by all homeowners as a result, not just those in default on their mortgages. This article assesses the impact of this wave of foreclosures on communities and the courts, and suggests that jurisdictions should adopt the techniques of those problem-solving courts already in existence: i.e., drug courts, mental health courts, community courts and domestic violence courts. These techniques involve active judges in non-traditional roles engaging in systemic reform and close monitoring of litigant conduct while utilizing non-adversarial approaches and enlisting the assistance of interdisciplinary stakeholders. Such techniques are well suited to the foreclosure context, particularly given the nature and scope of the subprime mortgage crisis, and court systems should consider creating specialized foreclosure courts that can adopt a problem-solving approach to address the rapid rise in foreclosure proceedings.
"Law and the Polarization of American Politics"
*Georgia State University Law Review, Vol. 25, No. 339, 2009*
*Albany Law School Research Paper No. 9*

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Changes in American law have played a major role in creating the partisan environment that many denounce. These changes have involved parallel trends in the law of political campaigns and elections and the law of mass communications. The collective impact of these changes has not been appreciated. This article brings these developments together and identifies their collective impact.

The article demonstrates how legal regulation shaped the centrism of the mid-twentieth century and regulatory shifts in media and election law shaped the partisanship of recent decades. Sensible proposals will not and should not bring the naive centrism of earlier decades back. But they might curb the excesses of contemporary politics.

"The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending"
*Yale Journal on Regulation, Vol. 25, No. 181, 2008*
*Albany Law School Research Paper No. 10*

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Evaluating the cost of credit and comparison shopping in the modern credit environment can be a daunting task, even for the most sophisticated shoppers. Lenders increasingly unbundle the costs of their loans from the interest rate into an array of fees, outsource their overhead to third parties who add to the consumer’s cost, and unveil amazingly complex loan products that dazzle and confuse borrowers. At the same time, the preemption of state usury and consumer protection laws by Congress and the federal banking agencies spurred deregulation at the state level. Today, the consumer credit marketplace is governed almost exclusively by disclosure rules. The subprime mortgage crisis of 2007 resulted from allowing the market to police itself and from the failure of disclosure to curb abuses.

Nearly forty years ago, Congress addressed the problems caused by lack of transparency in credit pricing when it enacted the Truth in Lending Act (TILA). Congress intended to promote informed consumer shopping and a level playing field for lenders by requiring standard disclosure of the cost of credit, most simply through the annual percentage rate (APR) and the finance charges upon which the APR is based. The value of the APR disclosure has deteriorated since 1968 due to exclusions from the finance charge definition created primarily by the Federal Reserve Board.

The article documents the history of this decline for the first time and describes the consequences of an APR disclosure that has become incrementally weaker as an indicator of the true cost of the credit. This article draws upon financial literacy, cognitive psychology, and behavioral economics literature to justify the need for a more effective APR.

The authors posit a simple litmus test for the finance charge that creates a more effective APR. They discuss why this test is superior to other proposed definitions of the finance charge and respond to arguments that a fee-inclusive APR is unhelpful to consumers and harms the industry.

This article is particularly timely because the Federal Reserve Board is currently undertaking a sweeping overhaul of TILA disclosure regulations, including the finance charge definition. Given the state of the credit marketplace, the authors conclude that a robust APR is more critical now than it was in 1968.

"Which Party Pays the Costs of Document Disclosure?"
*Pace Law Review, Vol. 29, No. 441, 2009*
*Albany Law School Research Paper No. 11*

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The disclosure of electronically stored information has become an integral part of litigation in the twenty-first century; accordingly, the concomitant costs of document production have significantly increased. CPLR Article 31 does not expressly state which party is responsible for the costs of production incurred in response to a demand for “documents or any things.” This article explores the development of a questionable rule cited by several New York State tribunals in allocating the costs of document disclosure, while suggesting that the courts adhere to CPLR Article 31’s more flexible approach.

In Lipco Elec. Corp. v. ASG Consulting Corp, the New York Supreme Court concluded that “the party seeking discovery should incur the costs incurred in the production of discovery material.” However, this rule limits the inherent flexibility of Article 31, and is neither supported by the text of the CPLR, nor by the case law cited in the article. This article respectfully submits that the disclosure process will function more efficiently and fairly without...
a general rule requiring the party seeking “documents or any things” to bear the costs of production. Parties should be encouraged to discuss disclosure costs as early as possible, and request a protective order from the court if necessary.

"Dumb & Dumber: Reckless Encouragement to Reckless Wrongdoers"
Albany Law School Research Paper No. 12

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This paper deals with compound negligence, i.e., situations in which one person’s heedlessness helps another to commit a negligent offense. The conviction of the second party who actually commits the offense poses no unique problem; offenses committable through criminal negligence, such as involuntary manslaughter, are routinely available in every jurisdiction. But conviction of the first party who negligently provided the means or opportunity for the second party’s unreasonable behavior poses significant problems. Accomplice liability is unavailable as complicity requires an intention to aid another, which is absent in such cases. Causation might be tried, but the second party’s criminal negligence is apt to be considered an intervening, superseding cause. Reckless Endangerment, an offense pioneered by the Model Penal Code, may well be available in most States (60%), but by no means all, and where available is generally graded as a misdemeanor only, with a maximum imprison term of about a year. This paper argues that in many cases such a relatively minor grading is disproportional to the harm committed, such as death or serious physical injury, and proposes a new statute to address the area. Special problems considered in drafting the proposed statute include the degree of aid that ought to be sufficient for liability, the type and degree of harms that should be covered, and the mens rea that should be required, i.e., in Model Penal Code terms, either recklessness or negligence. Several unfortunate instances serve as case studies.

"Modernization of New York’s Land Use Laws Continues to Meet Growing Challenges of Sustainability"
Albany Law School Research Paper No. 13

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There has never been a more challenging time to practice land use planning and zoning law in New York. With goals of sustainability at the forefront of the land use regulatory agenda, this brief account of recent developments in land use law highlights some discernable trends, namely: the modernization and increased flexibility of New York State planning and zoning enabling acts, the inspired local initiatives and lethargic State response to affordable housing issues, and the increasing impact of alternative energy systems on local regulatory schemes.

Part I of this article explores the impacts on community development caused by the many modifications to New York State’s planning and zoning enabling acts over the last two decades. Particularly, the article identifies the delegation of extensive discretionary authority to local governments as New York’s signature approach to land use control.

Part II discusses “affordable housing” as a key attractant for judicial action and local government response. With the exception of the Long Island Workforce Housing Act in 2008, the State has been slow to act on judicial calls to action, forcing local governments to develop unique solutions in order to provide affordable housing.

Finally, Part III notes the challenges being faced by lawyers and planners in light of growing preference for alternative energy systems, with specific focus on reactions to Wind Energy and Solar Energy installations.

"At Home with Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment"
Environmental Law, Vol. 39, No. 3, 2009
Albany Law School Research Paper No. 14

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Green building, which was formalized only fifteen years ago to promote healthier and more efficient building practices, has exceeded virtually all predictions of its potential. Green building has entered markets in almost every major city in the United States, while developing as a sophisticated basis for investment, human health, and conservation. Stated otherwise, green building is no longer a fringe environmental policy and, as argued in this Article, is even shedding its markings as a political ideology.

This Article examines two parallel but distinct consequences of the green building movement. First, by considering the major challenges to green building, this Article examines the conditions for success of the movement – how green building has become acceptable to consumers, the construction industry, and building regulators. Second,
this Article explores the relationship between the goals and methods of green building laws and argues that green building compels a transformative, constructivist effect on humans’ place and position in nature. This Article ultimately argues that green building is special because of its pluralistic approach to regulation, ethics, and even to nature itself.

"To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery"

**Albany Law School Research Paper No. 15**

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Intimacy and sex are important to the health and well-being of all adults, including elderly nursing home residents with dementia. To Be or To Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery, examines the practical problems confronting nursing homes when dealing with sexual relationships between nursing home residents with dementia and the various standards that could be used to determine whether individual relationships should be allowed to continue. As an example of the problems facing nursing homes, the article focuses on adulterous relationships between nursing home residents when the nonresident spouse objects. The issue of adulterous relationships is particularly topical because last year, former Supreme Court Justice Sandra Day O'Connor revealed that her husband, who has Alzheimer's disease and is living in a nursing home, was having a romantic relationship with another resident in the home.

The article demonstrates that traditional standards used for making medical decisions for demented patients in nursing homes, such as substituted judgment and the best interests test, are inadequate for making decisions regarding intimacy and sexual relationships. Substituted judgment focuses on critical interests, or values held before the resident became incompetent, and does not adequately address the fact that values and circumstances change during the many years that a resident may live with dementia. Best interests focuses on the resident’s experiential or pleasurable experiences and ignores the values the resident created and nurtured while rational - values that may include religious convictions and loyalty to family.

This article proposes that nursing homes employ a new balancing test that takes into account the critical interests, or former values, held by the demented resident and also gives weight to the current experiential interests or needs of the patient for intimacy and sex. Unlike any former test, it also takes into account that critical interests may change with dementia because the demented patient may live for a long time.

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